BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2001-19-C - ORDER NO. 2001-286

APRIL 3, 2001

IN RE:	Petition of IDS Telcom, LLC for Arbitration of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252(b).	))))	ORDER ON ARBITRATION

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Petition for Arbitration ("Petition") filed by IDS Telcom, LLC ("IDS") for arbitration of certain terms and conditions of a proposed Interconnection Agreement by and between IDS and BellSouth Telecommunications, Inc. ("BellSouth"). This proceeding arose after IDS and BellSouth were unable to reach agreement on all issues despite good faith negotiations. On January 5, 2001, IDS filed its Petition regarding those issues which IDS and BellSouth were not able to resolve. The Petition was filed pursuant to the provisions of Section 252 of the Telecommunications Act of 1996 ("1996 Act"). 47 U.S.C. § 252. The Petition set forth eleven unresolved or "open" issues (Issues A-K)[1]. On January 30, 2001, BellSouth timely filed its Response to IDS's

[1] Throughout this Order, the Issues will be identified by the letter as designated in IDS's Petition.

Petition.

Negotiations between IDS and BellSouth continued after the filing of the Petition. At the time of the hearing, the parties had resolved Issues C, J, and K, leaving eight "open" issues to be addressed at the hearing.

The hearing on this Arbitration was held on March 12, 2001, with the Honorable William Saunders, Chairman, presiding. During the hearing, each of the parties' witnesses presented summaries of their testimony regarding the eight remaining issues in this matter. However, the parties agreed to waive cross-examination on five of the issues (Issues A, F, G, H, and I) because the parties believed that settlement of those issues was imminent. Indeed, prior to the Commission's decision on this matter, the parties notified the Commission that the parties resolved those five issues. Thus, the Commission will only address in this order the three issues (Issues B, D, and E) that remain disputed.

At the hearing, IDS was represented by B. Craig Collins, Esquire, and Walter Steimel, Jr., Esquire. BellSouth was represented by Caroline N. Watson, Esquire, William F. Austin, Esquire, and Patrick W. Turner, Esquire. IDS presented as witnesses William P. Gulas and Keith G. Kramer, and IDS offered the direct and rebuttal testimony of Mr. Gulas and Mr. Kramer[2]. BellSouth presented as witnesses Ronald M. Pate, David P. Scollard, Thomas G. Williams, and John A. Ruscilli.[3] All prefiled testimony and the

[2] IDS prefiled with the Commission and served BellSouth with the direct testimony of Mr. Gulas and Mr. Kramer on February 12, 2001, and prefiled and served the rebuttal testimony of both witnesses on March 5, 2001.

[3] BellSouth prefiled with the Commission and served IDS with the direct testimony of Mr. Pate, Mr. Scollard, Mr. Williams, and Mr. Ruscilli on February 26, 2001, and prefiled and served the surrebuttal testimony of Mr. Pate, Mr. Williams, and Mr. Ruscilli on March 7, 2001. During the hearing, counsel for BellSouth explained that BellSouth did not prefile surrebuttal testimony from Mr. Scollard because BellSouth believed that the issues upon which Mr. Scollard would have presented surrebuttal testimony had

exhibits thereto were admitted into the record without objection. Following the hearing, both parties filed briefs and proposed orders addressing the issues.

II. LEGAL STANDARDS AND PROCESSES FOR ARBITRATION UNDER THE 1996 ACT

The 1996 Act provides that parties negotiating an interconnection agreement have the duty to negotiate in good faith.[4] After negotiations have continued for a specified period, the 1996 Act allows either party to petition a state commission for arbitration of unresolved issues.[5] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[6] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the parties with respect to those issues; and (3) any other issues discussed and resolved by the parties."[7] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the state commission receives the petition.[8] The 1996 Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and the response.[9]

Through the arbitration process, the Commission must now resolve the three

been settled. At the request of BellSouth, and without objection by IDS, the Commission allowed Mr. Scollard to present surebuttal testimony during the hearing.

[4] 47 U.S.C. § 251(c)(1).
[5] 47 U.S.C. § 251(b)(2).
[6] *See generally,* 47 U.S.C. §§ 252(b)(2)(A) and 252(b)(4).
[7] 47 U.S.C. § 252(b)(2).
[8] 47 U.S.C. § 252(b)(3).
[9] 47 U.S.C. § 252(b)(4).

remaining disputed issues in a manner that ensures the requirements of Sections 251 and 252 of the 1996 Act are met. The obligations contained in those sections of the 1996 Act are the obligations that form the basis for negotiation, and if negotiations are unsuccessful, those sections then form the basis for arbitration. Once the Commission provides guidance on the unresolved issues, the parties will incorporate those resolutions into a final agreement that will then be submitted to the Commission for its final approval.[10]

The purpose of this arbitration proceeding is the resolution by the Commission of the remaining disputed issues set forth in the Petition and Response.[11] Under the 1996 Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission ("FCC") regulations pursuant to Section 252; shall establish rates according to the provisions of Section 252(d) for interconnection, services, and network elements; and shall provide a schedule for implementation of the terms and conditions by the parties to the Agreement.[12]

III. ISSUES

As noted above, IDS's Petition set forth eleven issues for arbitration, identified as Issues A-K in the Petition. Prior to the hearing, the parties resolved three of those issues (Issues C, J, and K). Following the hearing but prior to the Commission's decision on this matter, the parties resolved five additional issues (Issues A, F, G, H, and I). Therefore, three issues remain for the Commission to resolve. The issues (Issues B, D, and E) which

[10] 47 U.S.C. § 252(e).
[11] 47 U.S.C. § 252 (b)(4)(c).
[12] 47 U.S.C. § 252(c).

the Commission must resolve are set forth as follows :

Issue B: Should BellSouth be allowed to prohibit IDS from identifying BellSouth as the underlying source of services provided by IDS, in discussions between IDS and customers or potential customers?

Issue D: Should BellSouth be required to provide combined network elements that are ordinarily combined in the BellSouth network even if those combined network elements were not already combined at the particular location at which the network elements are requested by IDS?

Issue E: Should BellSouth be allowed to restrict the way in which two competitive local exchange carriers ("LECs") provide services over the same loop, by imposing the rule that BellSouth will deliver a loop and a port to the collocation space of either LEC only in those situations where the loop and port are stand alone network elements, but will not support line sharing in situations in which the competitive LECs are using unbundled network element platform ("UNE-P") combinations?

IV. DECISION ON THE ISSUES

In this section, we will address and resolve Issues B, D, and E, which are the issues that have not been settled by negotiations between the parties and, therefore, must be resolved by the Commission pursuant to Section 252(b)(4) of the 1996 Act.

Issue B: Should BellSouth be allowed to prohibit IDS from identifying BellSouth as the underlying source of services provided by IDS, in discussions between IDS and customers or potential customers?

IDS's Position:

In its Petition, IDS sets forth its position on Issue B as follows:

> IDS believes that there are several reasons supporting a Commission requirement that the interconnection agreement must include provisions under which it is permissible for IDS to provide information to consumers, either directly or upon request, disclosing the fact that BellSouth is the underlying source of some of the services provided by IDS.
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> First, consumers would benefit from such a requirement. Second, competition would benefit from a requirement that information regarding the underlying service provider can flow freely in contacts between IDS and customers or potential customers. IDS believes that it is fair to presume that BellSouth's hidden motive for opposing IDS's authorization to provide underlying service provider information to consumers is that this opposition furthers BellSouth's agenda of stifling competition and protecting its market share. Finally, there is no countervailing detriment that would warrant cutting off the free flow of information between IDS and consumers.
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> It is a fact that the information that IDS seeks authorization to provide to consumers is a matter of public record. The business relationship between BellSouth and IDS would be fully described in the interconnection agreement, which Section 252(h) of the Act requires to be a public document to which any consumer can gain access. IDS merely seeks authority to tell consumers what is spelled out in the agreement.[13]

BellSouth's Position:

By its Response, BellSouth states its position with regard to Issue B as follows:

> BellSouth is willing to allow IDS (or its telemarketers) to use BellSouth's name in response to a direct individual inquiry from a particular customer or potential customer regarding the source of the underlying service or the identity of a service technician. Aside from those situations, however, using BellSouth's name as a "selling point" for services IDS offers – especially in the context of telemarketing – could easily lead to customer confusion. BellSouth, therefore, is unwilling to agree to language which

[13] "Petition for Arbitration of IDS Telcom, LLC," (hereafter referred to as "Petition"), Exhibit 5 (Matrix of "Disputed Issues and Positions of the Parties"), pp. 2-3.

would lead to customer confusion by permitting telemarketers to use BellSouth's name to sell IDS's services.[14]

Discussion:

IDS contends that consumers will be benefited if IDS has the authority to reference on its own initiative in its telemarketing activities that IDS relies upon the underlying BellSouth network infrastructure in its provision of services to end users.[15] IDS argues that consumers are in a better position to make informed judgments about their choice of telecommunications services if they possess more, rather than less, information.[16] IDS states that consumers have a right to know, up front, that the same BellSouth network infrastructure is used in the provision of all competitive local exchange services. IDS also maintains that, as the information about IDS's reliance upon the BellSouth network infrastructure is publicly available (through access to the terms and conditions of the Interconnection Agreement on file with the Commission), there is no credible argument that consumers could be harmed by the direct provision of this information by IDS.[17]

Finally, IDS argues that consumers would not be confused by IDS's references to its reliance upon the BellSouth network because the contractual provisions advocated by IDS permitting the references require a clear and unambiguous reference to this use that would not be susceptible to any misunderstanding or confusion. IDS asserts that most of

[14] "BellSouth Telecommunications, Inc.'s Response to IDS Telcom, LLC's Petition for Arbitration," (hereafter referred to as "Response") Exhibit A ("BellSouth's Matrix of Unresolved Issues with IDS"), p. 1.
[15] Prefiled Direct Testimony of William P. Gulas, Tr. at 17 (hereafter referred to as "Gulas Direct"); Prefiled Rebuttal Testimony of William P. Gulas, Tr. at 65 (hereafter referred to as "Gulas Rebuttal").
[16] Gulas Direct, Tr. at 17.
[17] Gulas Direct, Tr. at 11, 12; Gulas Rebuttal, Tr. at 64.

the customers with whom IDS deals are business customers with a sophisticated understanding of their telecommunications needs and their dealings with telecommunications service providers, further decreasing the likelihood of confusion.

BellSouth maintains that IDS should be prohibited from referencing its use of the BellSouth network (unless it does so in response to a direct question from a consumer) because permitting such references in IDS's telemarketing activities would provoke customer confusion.[18] According to BellSouth, IDS's references to BellSouth could easily result in consumers mistakenly concluding that, if they subscribed to IDS, they would still continue to receive their service from BellSouth.[19] In addition, BellSouth has submitted into the record, without objection, examples of IDS telemarketing contacts with consumers which BellSouth asserts support its claim that IDS's references to BellSouth generate customer confusion.[20]

The protection and promotion of consumer interests is of paramount concern to the Commission. The question of whether consumers would be harmed or benefited by IDS's proposal is therefore central to our resolution of this issue. While we generally agree with IDS's general proposition that the free flow of information to consumers should be promoted, we conclude that the evidence and discussion in the record support a finding that customer confusion could easily and logically result from IDS's proposed

[18] Tr. at 216; Prefiled Direct Testimony of John A. Ruscilli, Tr. at 159-60 (hereafter referred to as "Ruscilli Direct"); Prefiled Surrebuttal Testimony of John A. Ruscilli, Tr. 203 (Hereafter referred to as Ruscilli Surrebuttal").
[19] Ruscilli Surrebuttal, Tr. 199.
[20] *Id.*, Tr. 198-202 (summarizing cases submitted in Hearing Exhibit No. 3.)

language. We base our conclusion that consumers could be confused (and therefore harmed) by IDS's references to its use of the BellSouth network on the following considerations and findings.

The record reveals that IDS "agrees with the general restrictions proposed for inclusion in the agreement under which each party is generally prohibited from using the name, logo, trademark, or service mark in any sales, marketing, or advertising of its telecommunications services."[21] IDS also is willing to agree to a restriction under which it would not reference BellSouth or the BellSouth network in any of its radio, television, and general circulation print media advertising.[22] Additionally, BellSouth is willing to allow IDS (or its telemarketers) to use BellSouth's name in response to a direct individual inquiry from a particular customer or potential customer regarding the source of the underlying service or the identity of a service technician. As a practical matter, therefore, the dispute regarding this issue is whether telemarketers representing IDS should be allowed to use BellSouth's name to sell IDS's services.

IDS makes no qualms about its position that BellSouth's provision of the services IDS provides is "an important 'selling point,'"[23] and IDS makes it clear that it wants to use BellSouth's name in IDS's telemarketing efforts to solicit existing or prospective customers.[24] Unfortunately, using BellSouth's name as a "selling point" for services IDS offers – especially in the context of telemarketing – often leads to customer confusion. As BellSouth witness Mr. Ruscilli notes in his testimony, numerous business and

[21] *See* Petition at Paragraph 31.
[22] *See* Petition at Paragraph 28.
[23] *See* Petition at ¶30.
[24] *See*, e.g., Petition at ¶28.

residential customers have complained to BellSouth that IDS's telemarketing statements are, at best, confusing to them.[25]

Many of these customers also complained that because of IDS's use of BellSouth's name in its telemarketing efforts, they did not realize that they were changing their service from BellSouth to IDS.[26] Additionally, several other BellSouth customers have signed written declarations and letters detailing the confusion caused by IDS's use of BellSouth's name in its telemarketing efforts.[27] It is clear from the record, therefore, that adopting IDS's position on this issue would lead to significant customer confusion.

IDS appears to suggest that the Commission should simply ignore the confusion that would arise from adopting IDS's position because the telecommunications business is already confusing. In presenting his summary of his testimony, IDS witness Mr. Gulas suggested that confusion already exists among customers because until recently, incumbents held the exclusive right to provide local exchange service in their service areas.[28] If, as suggested by Mr. Gulas, confusion already exists in the local exchange market, then this Commission must implement measures to eliminate such confusion rather than encourage efforts that perpetuate and compound such confusion.

Additionally, IDS's witness Mr. Gulas notes that BellSouth can "reference the speed, reliability, redundancy, and efficiency of the BellSouth network," and he claims that the same type of reference "should also be allowed in the case of any competitive

[25] Ruscilli Surrebuttal, Tr. at 198-200; Hearing Exhibit No. 3.
[26] *Id.*
[27] Ruscilli Surrebuttal, Tr. at 200-202; Hearing Exhibit No. 3.
[28] Tr. at 111.

LEC that also receives services from that same network.[29] As Mr. Gulas acknowledged on cross examination, however, IDS can, in fact, make statements regarding the speed, reliability, redundancy, and efficiency of the network it uses to serve its customers without referencing BellSouth's name.[30] Adopting BellSouth's position on this issue, therefore, would permit IDS to tout the benefits of the network it uses to provide service to its customers while avoiding customer confusion as to whether BellSouth or IDS is providing the services IDS is offering to its customers.

Finally, IDS claims that if BellSouth has a concern regarding IDS's unauthorized use of BellSouth's name in its telemarketing efforts, BellSouth should file a suit against IDS under the Lanham Act.[31] BellSouth, however, understandably seeks to avoid having IDS defend such a suit by arguing that either: (1) BellSouth has agreed to allow IDS to use BellSouth's name in its marketing efforts; or (2) this Commission has in effect ordered BellSouth to allow IDS to use BellSouth's name in its marketing efforts by rejecting BellSouth's suggested language prohibiting such use. In fact, during cross examination, IDS witness Gulas acknowledged that if the Commission adopts IDS's position on this issue, IDS would consider raising such a defense against BellSouth if IDS felt that it was appropriate to do so under the circumstances.[32]

In conclusion, this Commission finds that the record clearly demonstrates that

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[29] Gulas Direct, Tr. at 15.
[30] Tr. at 291-92.
[31] In general, the "pivotal question" in a suit alleging a violation of the Lanham Act (or Trademark Act) is "whether there is a likelihood of 'confusion, mistake, or deception' caused by the unauthorized use of one's trademark or a colorable imitation thereof." *See John Walker & Sons, Ltd. V. Bethea*, 305 F.Supp. 1302, 1306 (D.S.C. 1969).
[32] Tr. at 294-95.

IDS's proposed use of BellSouth's name to market IDS's services will lead to customer confusion. In an effort to eliminate customer confusion, this Commission finds that telemarketing efforts by IDS should not reference BellSouth by name unless such reference is in response to a direct inquiry from a particular customer or potential customer regarding the source of the underlying service or the identity of a service technician. The Commission finds and concludes that this restriction is necessary to lessen, and hopefully avoid, customer confusion as to whether BellSouth or IDS is providing the services IDS is offering to its customers while permitting IDS to tout the benefits of the network it uses to provide service to its customers. The Commission, therefore, rules that parties must include the following language, suggested by BellSouth witness John Ruscilli on page 10 of his prefiled direct testimony, in their interconnection agreement:

> No License. Use of Marks. No patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. Both Parties are strictly prohibited from any use, including but not limited to in sales, marketing, or advertising of telecommunications services, of any name, logo, trademark or service mark (collectively, "Marks") of the other Party. Notwithstanding the foregoing, the Party receiving a service under this Agreement may, as necessary and as the case may be, make oral and factual references to the trade name "BellSouth" or "IDS" in response to a direct individual inquiry from a particular customer or potential customer regarding the source of the underlying service or the identity of a service technician; provided, however, that IDS's advertising and marketing materials shall not reference BellSouth or BellSouth's network as the source of the service provided by IDS. In addition, either Party may reference the trade name "BellSouth" or "IDS" in comparative advertising so long as the reference is truthful and factual, does not infringe any intellectual property rights of the other Party and otherwise complies with all applicable laws

Issue D: Should BellSouth be required to provide combined network elements that are ordinarily combined in the BellSouth network even if those combined network elements were not already combined at the particular location at which the network elements are requested by IDS?

IDS's Position:

With regard to Issue D, IDS's Position as set forth in its Petition is as follows:

> Section 51.315(b) of the FCC's Rules states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." This rule was adopted in the FCC's *Local Competition Order*, along with additional requirements that incumbent LECs combine unbundled network elements. Although the Eighth Circuit Court of Appeals vacated these rules, the Supreme Court reinstated Section 51.315(b). When the FCC originally adopted Section 51.315(b), it used language virtually identical to that proposed by IDS.
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> IDS's proposal would not require BellSouth to combine network elements that are not currently combined in BellSouth's network. There is no technical reason for BellSouth to refuse to combine these network elements because IDS's proposal includes only network elements ordinarily combined by BellSouth.
>
> The practical effect of IDS's proposal is very important for increasing local competition. Under BellSouth's formulation, IDS is limited to using UNE combinations only when BellSouth is already providing those combinations to that particular customer at the particular location involved. Thus, IDS cannot market new services, common in the BellSouth network, to former BellSouth customers who had not previously ordered those services.[33]

BellSouth's Position:

BellSouth's position on Issue D, as stated in its Response, reads as follows:

> "Currently combines" means that the network elements that IDS wants to purchase from BellSouth as a UNE combination are, in fact, physically combined and providing service to the customer that IDS wishes to serve. Under the 1996 Act, as construed by the courts and the FCC, there is no legal basis or need for this Commission to adopt an expansive view of "currently combined" so as to obligate BellSouth to combine elements for IDS. As the

[33] Petition, Exhibit 5, p. 4.

> FCC made clear in its *UNE Remand Order*, Rule 51.315(b) applies to elements that are "in fact" combined. The FCC declined to adopt the definition of "currently combined" that would include all elements "ordinarily combined" in the incumbent's network, which is the essence of IDS's position on this issue.[34]

Discussion:

The question to be answered by this issue is whether the meaning of Section 47.315(b) of the FCC's rules require an incumbent LEC to combine certain network elements at a location where a combination of network elements does not currently exist. IDS argues that BellSouth should be required to combine network elements at locations where the combination of network elements do not exist if BellSouth currently combines those network elements anywhere in the BellSouth network. IDS relies on the FCC's *Local Competition Order*[35] and an Order of the Georgia Public Service Commission to support its position. Also, IDS argues that it should not be required to place a resale order, pay resale rates for one month, and then pay to convert the customer to a UNE combination in order to achieve the same result using the definition of "currently combines" proposed by BellSouth. Instead, IDS contends that it should be allowed to order a UNE combination in the first instance, as long as BellSouth typically provides that UNE combination in its network.

BellSouth contends that it should not be required to combine network elements that are not already combined at a particular location in question. BellSouth relies on the

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[34] Response, Exhibit A, p. 2.

[35] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

FCC's *UNE Remand Order*[36] and the most recent Eighth Circuit Court of Appeals decision relating to the FCC's local competition rules in support for its position.[37] In addition, BellSouth asserts that there are costs associated with combining network elements that are not already combined and that IDS must either combine the network elements itself or pay BellSouth market rates to recover the costs of combining those network elements for IDS.

According to the testimony of IDS's witness Gulas, IDS is "basing its analysis [of this issue] on Section 51.315(b) of the FCC's rules . . . ."[38] This rule, however, simply states that unless requested to do so, "an incumbent LEC may not separate requested network elements that the incumbent LEC currently combines."[39] The plain language of this rule, therefore, simply prevents BellSouth from taking elements that are, in fact, actually combined in the network and "separating" them unless requested to do so.

It is our understanding that BellSouth is not proposing to separate elements that are already combined. BellSouth is simply stating that if IDS requests elements that are not, in fact, already combined and capable of providing service at a particular location, IDS may pay cost-based rates for each of those elements and either combine those elements itself or pay BellSouth market-based rates to combine those elements for it.[40] Alternatively, IDS could order resale (in which case the nonrecurring charges for that

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[36] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*"UNE Remand Order"*).
[37] *See Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir. 2000).
[38] Gulas Direct, Tr. at 25.
[39] *See* Rule 51.315(b).
[40] *See, e.g.,* Ruscilli Surrebuttal, Tr. at 206-208.

resale order compensate BellSouth for combining elements) and then convert it to UNE-P.[41]

IDS relies on language the FCC employed in its original *Local Competition Order*. Mr. Gulas, for example, states that "IDS's analysis is explained in the arbitration petition."[42] IDS's Petition, in turn, alleges that when the FCC adopted Rule 51.315(b), "it used language virtually identical to that proposed by IDS: 'Accordingly, incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined.'"[43]

As IDS notes in footnote 23 of its Petition, the language IDS quotes appears in Paragraph 296 of the FCC's *Local Competition Order*. However, our reading of the *Local Competition Order* reveals that the cited paragraph has nothing to do with Rule 315(b). Instead, it is Paragraph 293 of the *Local Competition Order* – which states that section 253(c)(3) of the Act "bars incumbent LECs from separating elements that are ordered in combination, unless a requesting carrier specifically asks that such elements be separated" – that addresses Rule 315(b). Paragraph 296 quoted by IDS concludes that incumbents are

> required to perform the functions necessary to combine elements, even if they are not ordinarily combined in the incumbent's

[41] *See* Ruscilli Surrebuttal, Tr. at 208-09.
[42] Gulas Direct, Tr. at 25.
[43] *See* Petition at ¶45.

> network, provided that such combination is technically feasible, or such combination would not undermine the ability of other carriers to access unbundled elements or interconnect with the incumbent LEC's network.[44]

That language from Paragraph 296 is nearly identical to the language of Rule 315(c) which has been vacated by the Eighth Circuit. Therefore, the language relied upon by IDS, and propounded by IDS as support for its position, is language the FCC used in adopting a rule that is no longer valid.

The rules that would most obviously support IDS's position are 51.315(c) (which would require BellSouth, upon request of IDS, to "perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in [BellSouth's] network . . . .") and Rule 51.315(d) (which would require BellSouth, upon request of IDS, to "combine unbundled network elements with the elements possessed by [IDS] in any technically feasible manner."). However, both of these rules have been vacated by the Eighth Circuit Court of Appeals.[45]

Additionally, the language the FCC subsequently used in its *UNE Remand Order* provides guidance on this issue. In that Order, the FCC stated "[t]o the extent that an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our rule 51.315(b) require the incumbents to provide such elements to requesting carriers in combined form."[46] In the very next sentence, the FCC stated that "in this Order, we neither define the EEL as a separate unbundled network element nor interpret rule

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[44] *See* Local Competition Order *at* ¶*296*.
[45] *See Iowa Utilities Board v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000)("We are convinced that rules 51.315(c)-(f) must remain vacated.").
[46] *UNE Remand Order*, ¶480. (emphasis added).

51.315(b) as requiring incumbents to combine unbundled network elements that are 'ordinarily combined' . . . ."[47] Later in that same Order, the FCC stated:

> In particular any requesting carrier that is collocated in a serving wire center is free to order loops and transport to that serving wire center as unbundled network elements because those elements meet the unbundling standard, as discussed above. Moreover, to the extent those unbundled network elements are already combined as a special access circuit, the incumbent may not separate them under rule 51.315(b) . . . (Emphasis added.)[48]

Thus, in its most recent Order addressing Rule 51.315(b), the FCC declined to interpret the rule as requiring incumbents to combine unbundled network elements that are "ordinarily combined." Instead, the FCC confirmed that the rule applies only to unbundled network elements that "in fact" are "already combined."

Subsequently, the Eighth Circuit released its July 18, 2000 opinion. In that opinion, the Court clearly explained that

> [In section 251(c)(3) of the 1996 Act], Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall 'combine such elements.' It is not the duty of the ILECs to 'perform the functions necessary to combine unbundled network elements in any manner' as required by the FCC's rules. We reiterate what we said in our prior opinion: '[T]he Act does not require the incumbent LECs to do all the work.'"

Iowa Utilities Board v. FCC, 219 F.3d 744, 759 (8th Cir. 2000) (emphasis in original). The Eighth Circuit was clear in its ruling that incumbents, like BellSouth, are not required to combine network elements at the request of CLECs like IDS.

Therefore, based upon the FCC" *UNE Remand Order* and the Eighth Circuit's decision, this Commission finds that BellSouth is not required to combine network

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[47] *Id.* (Emphasis added).
[48] *Id.* at ¶486.

elements that are not in fact already combined in its network. Accordingly, the Commission rules that BellSouth is obligated to provide combinations to IDS only where such combinations currently, in fact, exist and are capable of providing service at a particular location. The Commission further rules that if IDS wants BellSouth to combine unbundled network elements that are not in fact already combined, BellSouth is entitled to charge IDS market-based rates for doing so. Accordingly, the Commission orders that the parties shall include language in the Interconnection Agreement defining currently combined network elements as elements that are already combined within BellSouth's network to a given location.

Issue E: Should BellSouth be allowed to restrict the way in which two competitive LECs provide services over the same loop, by imposing the rule that BellSouth will deliver a loop and a port to the collocation space of either LEC only in those situations where the loop and port are stand alone network elements, but will not support line sharing in situations in which the competitive LECs are using UNE-P combinations?

IDS's Position:

> Both IDS and BellSouth agree that BellSouth is required to provide IDS combined network elements under some circumstances. Both parties agree that these network elements are often a loop and port combination known as UNE-P. The language of Section 3.1.6 of Attachment 2, however, is in direct contravention of the requirements of Section 51.315(b) of the FCC's Rules. Essentially, the disputed language says that BellSouth will separate an existing combined BellSouth retail service when an end user elects to cease subscribing to BellSouth as the end user's voice service provider.
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> In addition to violating Section 51.315(b) of the FCC's Rules, the disputed language of Section 3.1.6 violates nondiscrimination requirements of Section 251(c)(3) of the Act. The distinctions that BellSouth seeks to impose are discriminatory and anticompetitive because they make it more difficult and expensive for two different competitive LECs to offer voice and data services over the same loop and port that are currently combined in the BellSouth network. In addition, in situations where BellSouth offers voice service and a competitive LEC offers data services using the same

> loop, BellSouth will cross-connect to its own network without breaking the network into individual loop and port elements. Again, such discrimination violates Sections 251(c)(3).[49]

BellSouth's Position:

In its Response, BellSouth states its position on Issue E as follows:

> This issue addresses line splitting situations in which the loop that had been part of the UNE-P combination is unbundled. In those situations, IDS should be required to pay the cost-based non-recurring charges associated with handling the service order, unbundling the loop, running the loop to the splitter, and then running the voice frequency from the splitter to the port on BellSouth's switch. Additionally, once the loop is unbundled in this manner, IDS should be required to pay UNE rates for the loop and UNE rates for the port, rather than UNE-P rates for the loop-port combination.[50]

Discussion:

In addressing this issue, we will first examine what is involved in a UNE-P arrangement and in a line splitting arrangement. In a UNE-P combination, BellSouth provides a CLEC with a loop that runs from the end user's premises to a point on the front of the frame in BellSouth's central office. A cross-connection then runs from that point on the front of the frame to a point on the back of the frame. A cable then connects that point at the back of the frame to a port on BellSouth's voice switch.[51] Simply put, UNE-P is an arrangement by which one particular UNE (a loop) is directly connected to another particular UNE (a port).

[49] Petition, Exhibit 5, p. 5.
[50] Response, Exhibit A, p.2.
[51] *See* Tr. at 372.

With a line splitting arrangement, the frequencies of the loop are "split" so that both voice and data services can be provided over the same loop. Just as a road can be separated into two lanes, allowing two vehicles to travel side- by- side in the same direction over the same road at the same time, a loop can be separated into two sets of frequencies, allowing both voice and data to be delivered to the same customer over the same loop at the same time.[52] The voice is carried over the low frequency portion of the loop, and the data is carried over the high frequency portion of the same loop.[53]

To simultaneously provide voice and data to the same customer over the same loop, the loop must run through a device called a splitter.[54] The splitter separates the voice portion of the loop (the low frequency) from the data portion of the loop (the high frequency). The voice portion is then carried to a port on the voice provider's circuit switch, and the data portion is carried to a port on the data provider's packet switch.[55]

The arrangement that exists when IDS is involved in line splitting with another carrier is much different than what exists when IDS uses UNE-P to serve a customer.[56] As is the case with a UNE-P arrangement, BellSouth provides a loop that runs from the customer's premises to a point on the front of the frame in the central office, and a cross-connection that runs from that point on the front of the frame to a point on the back of the frame. Unlike a UNE-P combination, however, a cable does not connect that point at the back of the frame to a port on BellSouth's voice switch.[57]

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[52] Tr. at 347.
[53] *Id.*
[54] *Id.*
[55] Tr. at 347-348.
[56] Testimony of Williams, TR. at pp. 378-380.
[57] *Id.*

Instead, a cable carries both the voice and the data from the point on the back of the frame to the front of a splitter, which in the case of line splitting, has to be located in the collocation space of either the voice CLEC or the Data CLEC.[58] The splitter does exactly that, it splits the signal coming from the loop into two parts. The voice part, if the CLEC is buying unbundled switching from BellSouth, is connected via a cable to a port on the BellSouth switch, and the data stream is taken to the appropriate switch owned or leased by the Data CLEC.[59] This arrangement, in which a splitter is injected between the loop and the port, is a much more complex arrangement than a UNE-P, in which the loop is connected directly to the port.[60]

BellSouth points out that a line splitting arrangement differs from a UNE-P arrangement in that the splitter that is injected between the loop and the port is not a UNE.[61] BellSouth further notes that the splitter in a line splitting situation is typically not even a part of BellSouth's network. The FCC does not require an incumbent LEC to provide the splitter when two CLECs enter into a line splitting arrangement with one another. In its *Advanced Networks Reconsideration Order*,[62] which was released January 19, 2001, the FCC stated that LECs are obligated to permit line-splitting arrangements only "where the competing carrier [1] purchases the entire loop and [2] provides its own

[58] *Id.*
[59] *Id.*
[60] *See* Tr. at 364.
[61] Tr at 364.
[62] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docekt No. 96-98, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 01-26, (rel. Jan. 19, 2001) (*"Advanced Networks Reconsideration Order"*).

splitter."[63] Thus, when BellSouth is providing neither voice nor data to a customer being served by a line-splitting arrangement, BellSouth may require the CLECs involved in that arrangement to provide their own splitter.

Despite the plain language of the FCC's Order, IDS witness Mr. Kramer seems to suggest that this Commission should order BellSouth to provide the splitter in a line splitting arrangement. Mr. Kramer, for example, claims that "a repeater is not a UNE, but IDS could not provide service to customers if BellSouth removed all of the repeaters from its network for IDS customers and required IDS to provide its own repeaters."[64] Mr. Kramer also argues that "the approach suggested by [BellSouth] of terminating the UNE loop and UNE switching to IDS's collocated splitter and DSLAM is not economically feasible for a new entrant such as IDS."[65] These arguments, however, are similar to arguments the FCC considered and flatly rejected in its order approving the 271 application of Southwestern Bell to provide in-region interLATA services in Texas.

In that Order, the FCC summarized AT&T's arguments as follows:

> AT&T also argues that it has a right to line splitting capability over the UNE-P with SWBT furnishing the line splitter. AT&T alleges that this is 'the only way to allow the addition of xDSL service onto UNE-P loops in a manner that is efficient, timely, and minimally disruptive.' Furthermore, AT&T contends that competing carriers have an obligation to provide access to all the functionalities and capabilities of the loop, including electronics attached to the loop. AT&T contends that the splitter is an example of such electronics and that it is included within the loop element.[66]

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[63] *Advanced Networks Reconsideration Order* at ¶19.
[64] Kramer Rebuttal, Tr. at 139.
[65] *Id.* at 141.
[66] In the Matter of Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to

In ruling on AT&T's arguments, the FCC stated "[w]e reject AT&T's argument that SWBT has a present obligation to furnish the splitter when AT&T engages in line splitting over the UNE-P."[67] The FCC went on to note that in the *UNE Remand Order*, "[w]e did not identify any circumstances in which the splitter would be treated as part of the loop . . . ,"[68] (emphasis added), and it reiterated that "[w]ith respect to line splitting, as described above, we have not imposed any obligation on incumbent LECs to provide access to their splitters."[69]

Clearly, the FCC has not deemed a splitter to be a UNE. It is equally clear that BellSouth is not required under FCC rules or orders to provide the splitter when IDS enters a line splitting arrangement with a third party. Further, on the record before this Commission, it is also clear that line splitting does not involve a loop that is directly connected to a port. Rather, line splitting involves (1) a loop that is connected to equipment that is not a UNE and that typically is not part of BellSouth's network and (2) a port that is connected to equipment that is not a UNE and that is not part of BellSouth's network.

Even though line splitting is a much different and more complex arrangement than a UNE-P, IDS nevertheless maintains that it is entitled to pay UNE-P rates when it provides voice service in a line splitting arrangement. IDS apparently bases its position on the sentence in Paragraph 19 of the FCC's *Advanced Networks Reconsideration Order*

Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, FCC 00-238 (rel. June 30, 1999) at ¶326. (*"Texas 271 Order"*).

[67] *Texas 271 Order* at ¶327.

[68] *Id.*

[69] *Id.* at 329.

which states that "incumbent LECs have an obligation to permit competing carriers to engage in line splitting using the UNE-platform where the competing carrier purchases the entire loop and provides its own splitter."[70] IDS, however, does not address the fact that the next two sentences in that paragraph provide an explanation of what the FCC meant when it made this statement. Those sentences read as follows:

> For instance, if a competing carrier is providing voice service using the UNE-platform, it can order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment and unbundled switching combined with shared transport, to replace its existing UNE-platform arrangement with a configuration that allows provisioning of both data and voice services. As we described in the Texas 271 Order, in this situation, the incumbent must provide the loop that was part of the existing UNE-platform as the unbundled xDSL-capable loop, unless the loop that was used for the UNE-platform is not capable of providing xDSL service. (emphasis added).

The FCC, therefore, made it clear that if the loop that is a component of the existing UNE-P that is serving an end user is capable of providing xDSL service, the incumbent must provide that same loop to two CLECs who wish to provide voice and data to the same end user by way of a line splitting arrangement. The FCC also stated that "the incumbent must provide the loop that was part of the existing UNE-platform" so the CLEC can use that loop in implementing a configuration "to replace its existing UNE-platform arrangement . . ."(emphasis added).[71] Thus the FCC recognized that a UNE-platform that existed before the CLEC-owned splitter was introduced between the loop and the port no longer exists after that CLEC-owned splitter is introduced between the

[70] Tr. at 137-138.
[71] *Advanced Networks Reconsideration Order* at ¶19.

loop and the port. As the UNE-platform no longer exists after the introduction of the splitter in a line-splitting situation, IDS, therefore, is not entitled to pay UNE-P rates for a line splitting arrangement.

Moreover, it is obvious that accommodating a line splitting arrangement often requires BellSouth to perform additional work. Assume, for example, that IDS is providing only voice service to a customer and that it subsequently enters a line splitting arrangement with Data CLEC by which IDS provides voice and Data CLEC provides data to that customer over the same loop. Before IDS and Data CLEC entered this arrangement, the existing loop had been connected directly to the port that was serving the customer. To accommodate the line-splitting arrangement, however, BellSouth will be required to separate the loop from the port and deliver that loop to the appropriate collocation space where the splitter is located. At the same time, BellSouth will have to connect the port to that same collocated space so that the voice or data CLEC can make the proper connections to the splitter. It is only fair and equitable for IDS to compensate BellSouth for performing that work.

BellSouth witness Mr. Williams explained in his surrebuttal testimony that there could be limited situations in which BellSouth is not required to perform additional work to support a line-splitting arrangement between IDS and another provider. In those situations, BellSouth does not propose to charge IDS for any additional work. For example, assume that BellSouth is providing voice service to a customer, that Data CLEC is providing data services to that same customer over the same loop, and that Data CLEC is providing its own splitter in its collocation area. In that case, the loop will run to the

splitter in Data CLEC's collocation area. From there, the voice frequency will run to a port on BellSouth's switch and the data frequency will run to Data CLEC's packet switch.[72] IDS could subsequently win that customer's voice service from BellSouth and enter into a splitting arrangement with Data CLEC. In that event, BellSouth would have to perform no additional work to accommodate that arrangement because the loop serving that customer already runs to Data CLEC's splitter, and the voice frequency already runs from Data CLEC's splitter to the port on BellSouth's switch. BellSouth, therefore, would not seek to charge IDS for any work it was not required to perform.

However, this scenario does not mean that IDS is entitled to pay UNE-P rates. Even if no additional work is required, the fact remains that the arrangement IDS has received is not a loop connected to a port. Instead, it is a loop connected to a splitter that is not part of BellSouth's network and a port connected to a splitter that is not part of BellSouth's network. As explained above, this simply is not a UNE-P, and IDS is not entitled to pay UNE-P rates for such an arrangement.

During the hearing, IDS's witness Mr. Kramer suggested that in this scenario, the arrangement IDS is receiving is "already combined" in BellSouth's network.[73] However, it is clear from Mr. Williams' testimony that BellSouth is not seeking to charge IDS for "combining" anything that has already been combined in the existing arrangement. It is should also be noted that, as explained above, the arrangement that purportedly is already "combined" is a loop connected to a splitter and a port connected to a splitter. Regardless

[72] Tr. at 265-266.
[73] Tr. at 376.

of whether that arrangement is already "combined," it is not a UNE-P, and IDS is not entitled to pay UNE-P rates for that arrangement.

IDS also asserts that BellSouth's proposed language violates Section 51.315(b) of the FCC's rules which prohibits incumbent LECs from separating combined network elements except upon request. However, when a competitive LEC enters into a line splitting arrangement, UNE-P no longer exists. When the competitive LEC requests a line splitting arrangement, the competitive LEC in effect requests that the UNE-P combination be separated to accommodate the line splitting arrangement. This does not, as asserted by IDS, violate Section 51.315(b) of the FCC's rules because the competitive LEC is in effect requesting that UNE-P combination be unbundled.

Finally, IDS alleges that BellSouth's decision not to provide data services over a loop that a CLEC is using to provide voice services is somehow anticompetitive.[74] IDS's allegation is without merit. The FCC recently stated that "we deny AT&T's request for clarification that under the *Line Sharing Order*, incumbent LECs are not permitted to deny their xDSL [data] services to customers who obtain voice service from a competing carrier where the competing carrier agrees to the use of its loop for that purpose."[75] After denying AT&T's request, the FCC reiterated that "[a]lthough the Line Sharing Order obligates incumbent LECs to make the high frequency portion of the loop separately available to competing carriers on loops where the incumbent LEC provide

[74] *See, e.g.*, Tr. at 361.
[74] *Advanced Networks Reconsideration Order* at ¶26.

voice service, it does not require that they provide xDSL service when they are no longer the voice provider." *Id.* Clearly, the FCC has not required an incumbent LEC to provide xDSL service to a particular end user when the incumbent LEC is no longer providing voice service to that end user. IDS's contention that this practice is anticompetitive is therefore not persuasive when BellSouth is acting in accordance with the express language of the FCC's most recent Order on the subject.

Based upon the discussion above, the Commission finds that when a CLEC, providing voice service through a UNE-P combination, requests to convert to a line splitting arrangement, the UNE-P arrangement is replaced by individual network elements. Accordingly, the Commission orders that the following language be included in the Interconnection Agreement:

> BellSouth will work cooperatively with IDS to develop rates, methods and procedures to operationalize a process whereby two CLECs, one being a provider of voice services (a "Voice CLEC") and the other being a provider of data services (a "Data CLEC") may provide services over the same loop. Under such process, BellSouth will cross-connect a loop and a port to the collocation space of either the Voice CLEC or the Data CLEC. The cross-connected loop and port cannot be a loop and port combination (i.e. UNE-P), but must be individual and stand alone network elements. The Voice CLEC or the Data CLEC shall be responsible for connecting the loop and port to a CLEC owned-splitter. BellSouth shall not own or maintain the splitter used for this purpose. When such rates, methods and procedures have been developed and operationalized, then at the request of IDS, the Parties shall amend this Agreement to incorporate the same.

Further, the Commission rules that the proper rate for a line splitting arrangement is the sum of the recurring rates for an unbundled loop and an unbundled port plus the non-

recurring charges associated with any work BellSouth must perform to accommodate the line splitting arrangement.

V. CONCLUSION

The parties are directed to incorporate language in the Interconnection Agreement as described herein.

This Order is enforceable against IDS and BellSouth. BellSouth affiliates which are not incumbent local exchange carriers are not bound by this Order. Similarly, IDS affiliates are not bound by this Order. This Commission cannot enforce contractual terms upon a BellSouth or IDS affiliate which is not bound by the 1996 Act.

This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)